Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-763

CAMELIA BUILDERS, INC., ET AL,
Petitioners,

versus

FIDELITY MORTGAGE INVESTORS,
Respondent.

PETITIONERS REPLY TO BRIEF FOR FIDELITY MORTGAGE INVESTORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

Page

NATURE OF THE REPLY 1

RESPONSE TO BRIEF IN OPPOSITION 2

CONCLUSION 16

CERTIFICATE OF SERVICE 19

LIST OF AUTHORITIES

CASES:

Baker v. Conn. General Life Ins. Co., 18 So.2d 438 (Miss. 1944) 5

Freed and Co. v. Akron National Bank and Trust, 534 F2d 1235 (6th Cir. 1976) 6

In the Matter of Investors Funding Corporation of New York et al, (2nd Cir. December 15, 1976 (No. 76-5019), Slip Op. 983) 8,11

Loyd v. Stewart and Nuss, 327 F2d 642 (9th Cir. 1964) 6

Maness v. Myers, 419 U.S. 449, 42 L.Ed. 574, 95 S.Ct. 584 (1975) 18

McAllister et. al. v. Byrd, 55 So. 2d 435 (Supreme Court of Miss. Div. 'B' 1951) 14

McGonigle v. Foutch, 51 F2d 455 (8th Cir. 1931) 6

Turner v. President, Directors and Company of Bank of North America, 4 Dall. 9, 1 L. Ed. 718 (1799) 2

Union Central Life Insurance Co. v. Baer Co. Ltd., 10 F2d 153 (5th Cir. 1925) 6,8

LIST OF AUTHORITIES (Continued)

Page

In Re: Westec, 460 F2d 1139 (5th Cir. 1972) 16,18

Yoshinuma v. Oberdorfer, 136 F2d 460 (5th Cir. 1943) 6

STATUTES:

11 U.S.C. 1 3

11 U.S.C. 107 6

11 U.S.C. 516 7,9

11 U.S.C. 706 3

11 U.S.C. 713 10

11 U.S.C. 714 7

28 U.S.C. 959 9,12,14,17

OTHER AUTHORITIES:

Bankruptcy Rules

Chapter X Rules

10-601 9

10-701 16

Chapter XI Rules

11-44 4,9

MISCELLANEOUS:

1 Collier, Bankruptcy §2.62 (2) p. 336 (14th Ed. 1968) 7

6 Collier, Bankruptcy §3.31 (2) at 647 (14th Ed. 1972) 18

MISSISSIPPI CODE ANN. of 1972

§89-1-55 14

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NATURE OF THE REPLY

By reply to the Brief in Opposition of Respondents, Petitioners seek, with the Court's permission, to respond to certain new matter and clarify certain salient points reserving all arguments asserted in the Petition for Writ of Certiorari and the right to respond at a later date, in the event the Court grants the Petition, to numerous allegations in the Brief in Opposition

including but not limited to the assertion that Petitioners did not seek relief pursuant to Rule 11-44 (e), (Br. in Opp. p. 7), that Petitioners do not contest the deed of trust in issue (Br. in Opp. p. 21) or deny that property of the debtor is within the exclusive jurisdiction of the Chapter XI Court (Br. in Opp. p. 21) or any other matter wherein the Petition is in conflict with the Brief in Opposition.

ARGUMENT

A. JURISDICTION HAS NOT BEEN DEMONSTRATED

B. THE BANKRUPTCY COURT HAD NO JURISDICTION OF PETITIONERS OR THE SUBJECT MATTER

C. ALL ACTS OF FMI GIVING RISE TO THE FEDERAL PROCEEDING ARE WITHIN THE SCOPE OF 28 USC 959

D. THE CONFLICT OF INTEREST OF LEGAL COUNSEL FOR FMI IS CLEARLY ESTABLISHED

Jurisdiction Has Not Been Demonstrated

Respondent suggests that Petitioners have the burden to establish want of jurisdiction in the instant proceeding (Br. in Opp. p. 11), yet the presumption is that the courts below lack jurisdiction until it is demonstrated that jurisdiction exists. *Turner v. President, Directors and Co. of Bank of North America*, 4 Dall. 9, 1 L. Ed. 718 (1799).

Chapter XI of the Bankruptcy Act pursuant to Sec. 306, 11 USC 706 (App. 10a) defines a debtor to be a person under Sec. 22 of the Act. Sec. 22, 11 USC 1 (App. 2a, 4a) includes in pertinent part:

> "(8) "Corporation" shall include . . . any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument;" and
>
> "(23) "Persons" shall include corporations, except where otherwise specified . . ."

which perhaps includes a real estate investment trust. In discovery proceedings continuing in the State Court proceeding between the Contractor and FMI, after preparation of Petitioner's Petition herein, Petitioners have been furnished documents that establish FMI is not at any time material hereto a real estate investment trust, notwithstanding the sworn Petition under Chapter XI filed January 30, 1975, alleging that it was a real estate investment trust, and thus the threshold issue of whether FMI is such an entity as could invoke the protection of the Bankruptcy Act is unanswered.

While there is a reference on Exhibit "A" attached to said Petition indicating FMI is a Massachusetts Business Trust, the Court of Appeals operated under the assumption FMI was in fact a real estate investment trust (Petition for Writ of Certiorari App. p. 2a) and to date FMI has refused to furnish in the State Court

proceedings any documents pertaining to the existence of a Massachusetts Business Trust other than an alleged copy of the declaration of same together with amendments thereto.

The Bankruptcy Court Had No Jurisdiction Of Petitioners Or The Subject Matter.

Respondent is apparently correct in asserting that holding non parties in civil contempt for violation of a rule is without precedent. Petitioners agree as stated by FMI that:

> ". . . a civil contempt is a *litigant's* failure to do something *ordered* to be done in a civil action for the benefit of the *opposing party therein.*" (emphasis added) (Br. in Opp. p. 10)

The difficulty here is that no order was entered* and neither the Contractor nor the Petitioners were parties to the Chapter XI proceeding or creditors of FMI.

Petitioners agree as stated by Respondent that to constitute contempt the order must be ". . . specific and definite . . ." (Br. in Opp. p. 10). To determine whether the "order" is specific and definite other

* On August 1975 under cover letters dated August 8, 1975 Contractor received a copy of the Order of the Bankruptcy Court dated February 28, 1975 (Br. in Opp. p. 9 footnote) setting the first meeting of the Creditors for March 17, 1975 (FMI first scheduled the Contractor as a Creditor on July 29, 1975). Same was offered in evidence by Affidavit of Petitioners before the District Court for the limited purpose of showing the date of notice to the Contractor. The judgments of the Courts below are based on violation of Rule 11-44 (App. to Petitioner for Writ of Certiorari, 3a, 4a, 5a, 9a, 10a, 21a, 33a, 36a, 42a, 45a, 47a, 48a, 55a).

issues must be resolved including: What property of FMI is involved?

FMI was the beneficiary of a deed of trust wherein the Developer conveyed to Mr. James Young, Trustee, a security interest in the real property (a leasehold estate) to secure the payment of a promissory note of the Developer payable to FMI. The only right of a beneficiary of a deed of trust (FMI) is, in the event of default, to cause the Trustee (Mr. James Young) to sell the property and apply so much of the proceeds therefrom as are secured by the deed of trust to the debt owing, *Baker v. Conn. General Life Ins. Co.*, 18 So.2d 438 (Miss. 1944), and that has been done in the instant case. The remaining $75,964.33, not secured by the deed of trust because of the lien of the Contractor, was delivered by Mr. James Young to the registry of the court in the federal proceeding for as the Honorable Walter L. Nixon, Jr. Judge of the United States District Court for the Southern District of Mississippi found after hearing the evidence on March 28, 1975:

> ". . . we have a question as to whether the above proceeds are the property of the bankrupt, that is, which lien preempts."

The best that can be said for the position of FMI assuming arguendo that there is an issue of which lien preempts, is that there is a substantial adverse claim to the funds. (During the hearing before the Bankruptcy Court on April 10, 1975 the Court stated: "I can say right now that it would be my opinion that title to this property should be tried in Mississippi . . ." of which FMI has never had title or possession and consequent-

ly the Bankruptcy Court does not acquire jurisdiction thereof. (*Loyd v. Stewart and Nuss*, 327 F2d 642 (9th Cir. 1964).

In *Freed and Co. v. Akron National Bank and Trust*, 534 F2d 1235 (6th Cir. 1976) relied upon by Respondent the Court held specifically that the commencement of a Chapter XI proceeding did not oust the prior jurisdiction of a State Court proceeding to enforce a lien against property of the debtor, but that the bankruptcy court could, after hearing and determining the existence of equity in the property for the debtor, stay the *enforcement* of the lien. In the instant case the Contractor has sought only to preserve and protect its lien and there is no issue of equity for its lien is in the amount of $75,964.33. In this connection, it has long been the law that a Chapter XI proceeding does not oust the state court of jurisdiction to enforce a lien against the property of the *debtor* valid under 11 USC 107. (App. Petition for Writ of Certiorari 59a). *Yoshinuma v. Oberdorfer*, 136 F2d 460 (5th Cir. 1943).

As all rights of Respondent as a beneficiary of the deed of trust were already at issue in the State Court proceeding, the Bankruptcy Court has no jurisdiction to enjoin a foreclosure action because the title to the property is in a third person (developer), *Union Central Life Insurance Co. v. Baer Co. Ltd.*, 10 F2d 153 (5th Cir. 1925), but even if title were in FMI, still there is no jurisdiction to restrain the Contractor, *McGonigle v. Foutch*, 51 F2d 455 (8th Cir. 1931), because the rationale for staying secured creditors to the effect that such a

creditor extends credit to the debtor subject to the contingency that proceedings in Bankruptcy against the debtor may deprive him of the specific remedy contemplated in his contract, 1 Collier, *Bankruptcy*, §2.62(2) p. 336 (14th Ed 1968) is not applicable.

A major distinction between a Chapter X proceeding and a Chapter XI proceeding is that a Chapter X Court may stay lien enforcement on property of the Debtor pursuant to 11 USC 516(4) which provides in pertinent part:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court —
>
> (4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or proceeding to enforce a lien upon the property of the debtor."

whereas a Chapter XI Court has no jurisdiction to stay lien enforcement against property of the debtor except after notice and for cause shown pursuant to 11 USC 714 which provides in pertinent part as follows:

> "The court may, in addition to the relief provided by section 29 of this title and elsewhere under this chapter, enjoin or stay until final decree the commencement or continua-

> tion of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor."

It appears Congress has not intended that any bankruptcy court has jurisdiction to stay lien enforcement against property that is not the Debtor's; at least in the case of competing liens on property owned by a third person that is the rule in the Fifth Circuit. *Union Central Life Insurance Co. v. Baer Co., Ltd., supra.*

All Acts Of FMI Giving Rise To The Federal Proceeding Are Within The Scope Of 28 USC 959

The decision *In the Matter of Investors Funding Corp. of New York et al* (2nd Cir. December 15, 1976 (No. 76-5019), Slip Op. 983), a Chapter X corporate reorganization relied upon by Respondent (Br. in Opp. p. 33, 35-36) is a variance with the holding in the instant case. There Jaytee was the owner of property subject to a wrap around mortgage which wrapped around an underlying mortgage. The wrap around mortgage was the property of IFC which subsequently commenced a Chapter X corporate reorganization. Jaytee made a payment to the Trustee of IFC who in turn failed to timely make payment on the underlying mortgage. Jaytee commenced a lawsuit in the state court in New York for damages and to unwrap the said mortgage. During the pendency of the suit, Jaytee failed to make payments to the IFC on the wrap-

around, but did pay directly the underlying lien. IFC, represented by the same firm representing Respondent herein, rather than attempting to rely upon Rule 10-601 of the Chapter X Rules (App. 11a) which provides for automatic stay similar to Rule 11-44, sought and obtained a temporary restraining order. Upon hearing the Court made permanent the injunction and ordered Jaytee to pay owner the funds withheld aforesaid.

The Court of Appeals held that the "unquestioned" power of a Chapter X court to enjoin proceedings is indeed subject to question in the following language:

> "This power is limited, however, in situations in which the trustee or a debtor in possession is carrying on the business connected with the property entrusted to him."

The Court then notes that the apparent conflict between §116 (4), 11 USC 516 (4) supra granting authority to enjoin all lawsuits and 28 USC 959 (Petition for Writ of Certiorari p. 27) which permits suits without leave of the Court subject to the right of the Court to subsequently stop such suits when necessary to the ends of justice can be harmonized by a construction providing that an action against a debtor relating to its business activities may proceed ". . . unless the bankruptcy court, exercising sound discretion, finds the action would embarrass, burden, delay or otherwise impede the reorganization proceedings." and concludes that even though the value of the estate might be reduced, that alone is not sufficient to justify the injunction. The Court then concludes that before a Chapter X Court enjoins a lawsuit: "It must decide

first whether the lawsuit relates to "routine" business activities of the debtor that are carried on by the trustee."

In the instant case, the Petition under Chapter XI of FMI recites that FMI is in the business of "lending for construction and development of real estate, and in ownership and the attendant operations of ownership of real property." Mr. James Young testified before the Bankruptcy Court on April 10-11, 1975 that he commenced the foreclosure proceedings prior to the filing of the Chapter XI petition, that there was then a delay pending further negotiation with the Developer at the conclusion of which he resumed the foreclosure proceedings and that such proceedings were unrelated to the filing of Chapter XI petition, FMI purchased the property at the foreclosure sale, remodeled same from condominium units to apartment units and to this date operates same as an apartment project. The Bankruptcy Court concluded that the federal proceeding complaining of the manner in which the foreclosure was being conducted was not related to the operation of FMI's business. That it was only liquidating its estate. There is, however, no evidence that the Bankruptcy Court authorized such liquidation as required by 11 USC 713 (App. 10a).

Assuming arguendo, that the Bankruptcy Court is correct, how can it be said as a matter of law that Petitioners would know on March 24, 1975, that the foreclosure was not related to routine business activities? As that question awaited subsequent determination by the Bankruptcy Court, where is the order so specific that it could not leave any doubt in the minds of Petitioners as to the conduct proscribed?

As to the money ordered by the lower court to be paid to Jaytee in *Investors Funding Corp., supra*, the Court of Appeals speaking through the Honorable Judge Oaks said:

> "Judge Bonsal understandably hoped to save all the parties the expense of an additional action by cutting through legal "rights" to reach what would seem to the casual observer a very equitable and practical solution to the controversy, but he simply lacked the power to do so here."

In the instant case the Court of Appeals cut through the legal rights of the Contractor by classifying it as a creditor seeking to enhance its position in the reorganization. (App. Pet. for Writ of Cert. p. 19a).

The holding in *Investors Funding Corp., supra*, to the effect that a lawsuit involving a promissory note and mortgage securing same in existence prior to the bankruptcy proceeding is not automatically enjoined is the virtual antithesis of the instant case wherein the Court concludes that only a suit relating to an obligation arising after the commencement of the Bankruptcy Court proceedings may be brought without leave of the Court. *Investors Funding Corp., supra*, is the better reasoned of the two cases for it is predicated upon the act of the Trustee in failing to make payment on the underlying lien even though the obligation was one created prior to the existence of the Chapter X proceeding; that is, the distinction is the date upon which the event complained of occurs rather than the date upon which the relationships of the parties is established.

And now we have reached the gravamen of the offense of FMI which gives rise to the federal proceeding pursuant to 28 USC 959 for while Respondents Brief in Opposition suggests that Petitioner's allegation that FMI has committed a tort in the conduct of the foreclosure is an afterthought (Br. in Opp. p. 9) the record will reflect that:

1. In the Complaint in the federal proceeding which is the basis of this contempt proceeding it is alleged in paragraph 10: ". . . the notice of sale was not posted for three weeks prior to said sale, as required by the laws of the State of Mississippi;"

2. At the commencement of the hearing in the federal proceeding as counsel for Contractor was making his opening statement and remarked that the Contractor ". . . believes that the defendant has not complied with the laws of the State of Mississippi for foreclosure . . ." the Court interrupted and stated: "All right. Under the circumstances and due to the exigency of the situation, to deny Plaintiff the right to proceed at this time would be denying him his day in court to a moot question; . . ."

3. Prior to the hearing in the Bankruptcy Court on April 10, 1975, Petitioner filed a Response to the show cause order of said Court stating at page 4 thereof:

   ". . . that Mississippi law requires that the substituted trustee's notice of sale be continuously posted on the bulletin board

provided for that purpose at the courthouse of the county in which the property is located for a given period of time as provided according to Mississippi law but that FMI wholly failed to comply in so posting . . ."

4. At the hearing before the Bankruptcy Court, Petitioners offered in evidence an affidavit establishing that the notice of the sale was not posted on March 18, 1975 and produced for the Bankruptcy Court the applicable Mississippi statute after the reading of which the Court stated:

   "I am not familiar with Mississippi Law. I will just accept it for what it says without trying to construe it in any way;"

5. The brief filed by Petitioner in the Bankruptcy Court argued that failure to comply with Mississippi law constituted a tort.

6. The same arguments were presented in the pleadings before the District Court and in oral argument before said Court after Petitioners were refused the right to put on oral evidence; Petitioners asserting that the failure to comply with Mississippi law constituted a tort. (There is no record of the proceeding before the District Court); and again

7. at page 33 of the Brief of Appellants filed in the Court of Appeals Petitioners complained; ". . . of the tort of FMI visited upon the Joint Venture (Contractor) in failing to give proper notice of the sale.

The applicable statute is §89-1-55 Mississippi Code Ann. of 1972 (App. p. 14a), and it has been held in *McAllister et. al. v. Byrd*, 55 So.2d 435 (Supreme Court of Miss. Div. 'B' 1951) that where notice of the sale was posted continuously at the courthouse door from May 19 through date of sale on June 12, the trustee had complied with the statute. In the instant case it is uncontroverted that the notice was not continuously posted for three consecutive weeks prior to the sale on March 27 or 28, 1975. In addition, Mr. Young, Trustee, represented that he would sell good title when in fact the deed of trust lien reached only a leasehold estate.

Of course, as is provided in 28 USC 959, the Trustee's sale of the property in issue must be conducted in accordance with Mississippi law.

The Conflict Of Interest Of Legal Counsel For FMI Is Clearly Established

The assertion by Respondent to the effect that the allegation of conflict of interest is patently false (Br. in Opp. p. 47 footnote) is confusing in light of the record of the proceedings. Petitioners admittedly read a four line article in the Wall Street Journal on or about January 31, 1975, indicating Fidelity Mortgage had filed for bankruptcy. This information was communicated to Mr. Crockett, Mississippi counsel for the Contractor and he was asked to verify same. Mr. Young was served in the federal proceeding on March 25, 2975, and at time of hearing thereon on March 26,

1975, produced and offered in evidence a copy of the January 31, 1975 Wall Street Journal concerning FMI. The production of the newspaper article discussed only with Mr. Crockett seemed curious at the time, but before the Bankruptcy Court on April 11, 1975, Mr. Young testified on cross examination:

> "Well, if I am to be technical with Mr. Hubbard, I don't know whether it was or not but on or about that date Mr. Crockett, *who was then associated with me in the matter* (i.e. foreclosure) called me and informed me that he was at the Rankin County Courthouse and could not find the notice on the board."

The date of said call would have been March 18, 1975. It was on Thursday, March 20, 1975, while Petitioners were in Mississippi to discuss the defense of the lawsuit brought by Mr. Young's partners on behalf of the subcontractors against Contractor that Mr. Crockett first mentioned the possibility of a Chapter XI proceeding by producing a copy of the unsworn plea in abatement alleging a Chapter XI proceeding but giving no cause number therefore (Petition for Writ of Certiorari p. 20-21); Mr. Crockett having previously caused Petitioners to believe there was no such proceeding. Mr. Crockett further advised for the first time on March 20, 1975, that the property was posted for foreclosure, that the foreclosure sale was set for March 27, 1975, and that the foreclosure had not been properly posted. On Friday, March 21, 1975, Petitioners were again in Houston and it was on that date that they attempted without success to confirm the existence of the Chapter XI proceedings in New York by calling the Clerk of the Court. Petitioners were then left in the posture that if they were to obtain

any relief in Mississippi, pleadings would have to be on file by Monday morning, March 24, 1975, in order to obtain a hearing date prior to March 27, 1975 and to effect service. In the event Petitioners had gone to New York to verify the existence of the Chapter XI proceeding and had found there was no such proceeding on Monday, March 24, 1975, they would have been presented with a fait accompli. Accordingly, it does appear that the conflict of interest existing between Mr. Young and Mr. Crockett is a proximate cause of the factual development of the instant proceeding.

CONCLUSION

The Court below has decided this case on a narrow procedural issue: That a creditor of a developer with a mechanics lien on the property of the developer in Mississippi must obtain leave of the Bankruptcy Court in New York in order to preserve and protect its mechanics lien where a lender who is a creditor of the developer and also has a lien on the property of the developer invokes the protection of Chapter XI of the Bankruptcy Act and then seeks to alter the status quo by causing a fourth party, the Trustee of a deed of trust, to commence foreclosure proceedings at variance with Mississippi law.

Respondent attempts to support the decision by relying upon Part VII of the Bankruptcy Rules (Br. in Opp. p. 41), but Bankruptcy Rule 701 (App. 13a) and the Advisory Committee's Note thereto make clear that Part VII is applicable only in the event the Contractor elects to consent to the jurisdiction of the Bankruptcy Court. Similarly. *In Re: Westec*, 460 F2d 1139 (5th Cir.

1972) is inapplicable as same involves a Chapter X corporate reorganization; a mortgage under Florida State law and is decided on principals of equity; that is that it would be unconscionable for the debtor to lose a property interest worth nearly a quarter of a million dollars in order to recognize a tax foreclosure by a water district for the amount of twenty dollars.

As stated by the Court of Appeals herein:

> "The issue here is a procedural one: whether Camelia and Farnale should have secured permission from the New York Bankruptcy Court before proceeding with their action in Mississippi. Rule 11-44 required Camelia and Farnale to secure such prior permission." (Petition for Writ of Certiorari, p. 20a-21a)

The holding would be in direct conflict with 28 U.S.C. 959 which provides for suit without leave of the Court had not the Court rejected the argument of the Petitioners in connection therewith.

Assuming, arguendo, that the Court has correctly decided the issue of the applicability of 28 U.S.C. 959, the effect of the decision is that any attorney who seeks to bring suit pursuant to 28 U.S.C. 959: must, as the Court notes in its opinion: ". . . be prepared to confront the consequences." (Petition for Writ of Certiorari p. 22a) If a Court subsequently determines the attorney has properly brought suit under 28 U.S.C. 959, he has discharged his duty to both his client and the legal system by zealously representing his client pursuant to the Rules Governing the State Bar of Texas. If, on

the other hand, a Bankruptcy Court (which is a court of equity; *In Re: Westec, supra*,) subsequently determines the suit is not maintainable under 28 U.S.C. 959, then the attorney must pay to the defendant therein $20,701.44 for his contempt and this result notwithstanding this Court's prior decision in *Maness v. Meyers*, 419 U.S. 449, 42 L.Ed. 574, 95 S. Ct. 584 (1975).

Such a result may have the effect of nullifying the provisions of 28 U.S.C. 959 which was enacted to contract the jurisdiction of bankruptcy courts, 6 Collier, *Bankruptcy* § 3.31(2) at 647 (14th Ed. 1972).

For the foregoing reasons as well as those which have been argued in the petition, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the prescribed number of copies of the foregoing Petitioner's Reply Brief have been served on Weil, Gotshal & Manges, (Mr. Michael L. Cook, Mr. Richard P. Krasnow and Mr. Phillip H. Kalban), Attorneys for Respondent, Fidelity Mortgage Investors, 767 Fifth Avenue, New York, New York 10022, this ____ of February, 1977.

JEFFREY H. HUBBARD

APPENDIX

11 U.S.C. §1

CHAPTER 1. — DEFINITIONS

§ 1. *Meaning of words and phrases*

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "Adjudication" shall mean a determination, whether by decree or by operation of law, that a person is a bankrupt;

(3) "Appellate courts" shall include the United States courts of appeals and the Supreme Court of the United States;

(4) "Bankrupt" shall include a person against whom an involuntary petition or an application to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "Bona-fide purchaser" shall include a bona-fide encumbrancer or pledgee and the transferee, immediate or mediate, of any of them;

(5a) "Circuit" shall mean judicial circuit;

(6) "Clerk" shall mean the clerk of a court of bankruptcy;

(7) "Conceal" shall include secrete, falsify, and mutilate;

(7a) "Conference" shall mean the Judicial Conference of the United States;

(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument;

(8a) "Council" shall mean the Judicial Council of the circuit;

(9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;

(10) "Courts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable;

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and

may include his duly authorized agent, attorney, or proxy;

(12) "Date of adjudication" shall mean the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed;

(13) "Date of bankruptcy", "time of bankruptcy", "commencement of proceedings", or "bankruptcy", with reference to time, shall mean the date when the petition was filed;

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(14a) "Director" shall mean the Director of the Administrative Office of the United States Courts;

(15) "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this title;

(16) "Document" shall include any book, deed, record, paper, or instrument in writing;

(17) "Farmer" shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations;

(18) "Holiday" shall include New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Christmas Day, and any day appointed as a holiday or as a day of public fasting or thanksgiving by the President or the Congress of the United States, or by the Governor or the Legislature of the State in which the proceeding under this title is filed or pending;

(19) A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts;

(20) "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(21) "Oath" shall include affirmation;

(22) "Officer" shall include clerk, marshal, receiver, custodian, referee, and trustee, and the imposing of a duty upon, or the forbidding of an act by, any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(23) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden under this title shall include persons who are participants in the forbidden acts, and the agents, officers, and members

of the board of directors or trustees or of other similar controlling bodies of corporations;

(24) "Petition" shall mean a document filed in a court of bankruptcy or with a clerk thereof initiating a proceeding under this title;

(25) "To record" shall include to register or to file for record or registration;

(26) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead;

(27) "Relatives" shall mean persons related by affinity or consanguinity within the third degree as determined by the common law and shall include the spouse;

(28) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title or who owns such a debt for which some endorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(29) "States" shall include the Territories and possessions to which this title is or may hereafter be applicable, Alaska, and the District of Columbia;

(29a) "Statutory lien" shall mean a lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by

or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

(31) "Trustee" shall include all of the trustees and "receiver" shall include all of the receivers of an estate;

(32) "Wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year;

(33) Words importing the masculine gender may be applied to and include all persons;

(34) Words importing the plural number may be applied to and mean only a single person or thing; and

(35) Words importing the singular number may be applied to and mean several persons or things. July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27,

1926, c. 406, § 1, 44 Stat. 662; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921; June 22, 1938, c. 575, § 1, 52 Stat. 840; June 28, 1946, c. 512, § 1, 60 Stat. 323; July 7, 1952, c. 579, § 1, 66 Stat. 420; June 23, 1959, Pub.L. 86-64, § 1, 73 Stat. 109.

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§ 516. Same; additional jurisdiction over administration of estate

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court —

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;

(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;

(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to

lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and

(4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor;

(5) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

(6) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to vessels (as the term is defined in the Ship Mortgage Act, 1920, as now in effect or hereafter amended) leased,

subleased, or conditionally sold to any water carrier which holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission. and any right of such owner or of any other lessor to such water carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

July 1, 1898, c. 541, § 116, as added June 22, 1938, c. 575, § 1, 52 Stat. 885, and amended Sept. 4, 1957, Pub.L. 85-295, 71 Stat. 611, Oct. 17, 1968, Pub.L. 90-586, § 2, 82 Stat. 1149.

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SUBCHAPTER II — DEFINITIONS

§ *706. In general*

For the purposes of this chapter, unless inconsistent with the context —

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

(2) "consideration" shall include evidences of indebtedness, either secured or unsecured, stock and certificates of beneficial interest therein, and certificates of beneficial interest in property;

(3) "debtor" shall mean a person who could become a bankrupt under section 22 of this title and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

July 1, 1898, c. 541, § 306, as added June 22, 1938, c. 575, § 1, 52 Stat. 906.

* * * *

§ 713. Same; administration of estate

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter —

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

(2) upon such notice as the court may prescribe and upon cause shown, authorize the receiver or trustee, or the debtor in possession, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the court may approve;

(3) whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time.

July 1, 1898, c. 541, § 313, as added June 22, 1938, c. 575, § 1, 52 Stat. 906.

* * * *

Rule 10-406 BANKRUPTCY RULES — CHAPTER 10

(b) Unclaimed Money and Securities. Unless otherwise provided in the plan, the securities or cash remaining unclaimed at the expiration of the bar date fixed pursuant to Rule 10-405(b), or any extension thereof, shall be delivered to the new corporation acquiring the assets of the debtor under the plan, if any, otherwise to the reorganized debtor.

* * * *

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 10-501. Administrative Matters

Part V of the Bankruptcy Rules applies in Chapter X cases except that Rule 509(a) thereof shall include the following additional sentence: "If a Chapter X case is not referred pursuant to Rule 10-103(a), all papers shall be filed with the clerk of the district court or as directed by local rule or order of the district judge."

* * * *

PART VI. PROPERTY OF THE ESTATE

Rule 10-601. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 10-104 or 10-105 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate.

(b) Duration of Stay. Except as it may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (c), (d), or (e) of this Rule, the stay shall continue until the case is closed, dismissed or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of its estate, relief may be granted without written or oral notice to the adverse party if (1)

it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under the subdivision shall give written or oral notice thereof as soon as possible to the debtor, the trustee, receiver, or debtor in possession or, if none has been designated or qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining or injunction order when otherwise authorized.

* * * *

Rule 701: Scope of Rules of Part VII

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for

which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

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REAL AND PERSONAL PROPERTY
(Mississippi Code Ann. of 1972)

§ *89-1-55. How lands sold under mortgages and deeds in trust.*

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three consecutive weeks, preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. No sale of lands under a deed

of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.